STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

CHRYSLER INSURANCE COMPANY and HUNTINGTON FORD, INC.,

Defendants/Counterplaintiffs-Appellees/Cross-Appellants,

and

HUNTINGTON FORD, INC.,

Intervening Defendant/Counterplaintiff-Appellee/Cross-Appellant,

and

FOUR SEASONS RADIATOR SERVICE, INC., and STANLEY PHILIP SPANKE,

Defendants/Cross-Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
September 18, 2001

No. 219332
Oakland Circuit Court
LC No. 97-548746-CK

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this dispute over insurance coverage and indemnity liability for a settlement amount in an underlying motor vehicle negligence action, plaintiff Citizens Insurance Company of America (Citizens) and defendants Four Seasons Radiator Service, Inc. (Four Seasons) and Four Seasons'

employee, Stanley Spanke (Spanke) appeal by right from a judgment for defendant Chrysler Insurance Company (Chrysler) for $650,000 plus $24,360.94 in costs.[1] Chrysler and its subrogor, intervening defendant Huntington Ford, Inc. (Huntington Ford), cross-appeal from the judgment, raising an issue regarding prejudgment interest. We affirm but reduce the monetary judgment by $40,000.

Factual Background

Chrysler insured Huntington Ford, an automobile dealership, and Citizens insured Four Seasons, an automobile repair facility, at the time of a two-vehicle motor vehicle accident in September 1995. One of the vehicles involved in the accident was a dump truck owned by Huntington Ford, which Four Seasons had serviced by installing an air conditioner. At the time of the accident, Four Seasons' employee, Spanke, was returning the dump truck to Huntington Ford after completion of the service work.

The occupants of the other vehicle involved in the accident filed a negligence action against Huntington Ford, Four Seasons, and Spanke (hereinafter "the underlying negligence case"). While the underlying negligence case was pending, Citizens filed the instant action for a declaratory judgment against Chrysler. Citizens alleged that Four Seasons was its named insured under a garage liability policy that provided coverage for non-owned autos in excess of other collectible insurance. Citizens contended that Huntington Ford, the owner of the dump truck involved in the collision, was an insured under a policy issued by Chrysler, which provided personal injury benefits for bodily injury caused by an accident and resulting from the ownership, maintenance, or use of an owned auto. Citizens sought a declaration that Chrysler had a duty to defend, indemnify, and provide primary coverage for the damages in the underlying negligence case as the primary insurer.

Later, after the underlying negligence case was settled for $1,325,000,[2] Chrysler and intervener Huntington Ford filed a cross-claim against Four Seasons and Spanke and a counterclaim against Citizens. They alleged that Four Seasons and Spanke owed a duty to Huntington Ford "to conduct their operations under their contract in a safe, prudent, and reasonable manner so as not to impose liability upon Huntington Ford" and that the underlying negligence case arose out of the active and primary negligence of Four Seasons and Spanke. They sought contribution by way of a common law indemnity claim against Four Seasons and Spanke for the total settlement amount plus interest, costs, and defense expenses. They further alleged that Four Seasons and Spanke were not insureds under Chrysler's policy – and that Citizens, as opposed to Chrysler, was responsible for primary liability coverage – because at the time of the accident, Spanke was not engaged in Huntington Ford's "garage operations" as defined in the Chrysler policy.

Eventually, Chrysler and Huntington Ford moved for summary disposition, and Citizens also did so. The trial court granted summary disposition to Chrysler and Huntington Ford with respect to the common law indemnity claim against Spanke, ruling that Spanke's active

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[1] Chrysler's costs to defend Huntington Ford in the underlying negligence action.

[2] Chrysler paid $650,000 and Citizens paid $675,000 of the settlement.

negligence in the underlying negligence case and his approval of the settlement required that he indemnify Chrysler. The court further ruled that Chrysler, as the insurer of the owner of the dump truck, was the primary insurer for the accident at issue, that Spanke and Four Seasons were excluded from coverage under Chrysler's policy, and that this exclusion was contrary to public policy. Accordingly, the court reinstated Chrysler's coverage for Spanke and Four Seasons to the amount required by law: $40,000. Nevertheless, the court ruled that Chrysler could recover its total expenditures and costs by way of the common law indemnity claim (in other words, the court did require $40,000 to be subtracted from the total amount recovered by Chrysler). A final judgment was entered in March 1999 in favor of Chrysler for "$650,000 plus interest as determined by the court, plus $24,360.94 plus interest as determined by the court, with costs to be taxed."

Standards of Review

Although the trial court in the instant case did not state the particular subrule under which it decided the summary disposition motions, it is clear that the court relied on proofs outside the pleadings in reaching its decision. Accordingly, this Court may consider the motion as if it was decided under MCR 2.116(C)(10). *Ryant v Cleveland Twp*, 239 Mich App 430, 431 n 1; 608 NW2d 101 (2000). The following standards apply:

> On appeal, we review a trial court's ruling on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding a motion for summary disposition, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Id.* In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* at 455. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* [*Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999).]

In construing an insurance policy, the following general standards apply:

> An insurance policy is much the same as another contract; it is an agreement between the parties. A*uto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992); *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997). Any ambiguities in insurance contracts are liberally construed in favor of the insured and against the insurer, who drafted the contract. *State Farm Mut Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). This does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of

> which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 208, n 8; 476 NW2d 392 (1991). The fact that a policy does not define a relevant term does not render the policy ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). This Court must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). [*Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261-262; 617 NW2d 777 (2000).]

Finally, we review de novo the issue that Chrysler and Huntington Ford raise on cross-appeal, which involves a determination of which interest statute applies to the judgment. *Auto Club Ins Assoc v State Farm Ins Cos,* 221 Mich App 154, 169; 561 NW2d 445 (1997).

Were Four Seasons and Spanke "Insureds" under the Chrysler Policy such that Chrysler was Obligated to Defend and Indemnify them in the Underlying Negligence Case?

Citizens, Spanke, and Four Seasons (hereinafter "appellants") argue that Spanke and Four Seasons were "insureds" under Chrysler's policy because Spanke was participating in Huntington Ford's "garage operations" at the time of the accident. Accordingly, appellants contend that the trial court erred in granting summary disposition to Chrysler and Huntington Ford (hereinafter "appellees") and that Chrysler must pay for the accident to the extent of its $1,000,000 policy. Appellees argue that Spanke and Four Seasons were *not* "insureds" under Chrysler's policy because Spanke was not participating in Huntington Ford's "garage operations" at the time of the accident. We find no basis to reverse the trial court's ruling that Spanke and Four Seasons were excluded from coverage under Chrysler's policy.

The commercial policy issued by Chrysler to Huntington Ford includes a garage coverage form, which states at the beginning:

> Various provisions in this policy restrict coverage. . . .
>
> Throughout this policy the words "you" and "your" refer to the Named Insured [Huntington Ford] shown in the Declarations. The words, "we," "us" and "our" refer to the Company [Chrysler] providing this insurance.
>
> Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION VI - DEFINITIONS.

Section II of the form addresses liability coverage for "garage operations" of covered and non-covered "autos" (it is not disputed that the vehicle in this case was a covered "auto"). The specified liability coverage includes:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" .. . to which this insurance applies, caused by an "accident" and resulting from "garage operations" involving the ownership, maintenance or use of covered "autos."
>
> * * *

> We have the right and duty to defend any "insured" against a "suit" asking for such damages . . . .

This liability section defines an "insured" as follows:

> 1. WHO IS AN INSURED:
>
> (a) The following are "insureds" for covered "autos."
>
> (1) You for any covered "auto."
>
> (2) Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> * * *
>
> (c) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" *unless that business is your "garage operations."* [Emphasis added.]

"Garage operations" is defined in Section VI -- DEFINITIONS, § E, as follows:

> "Garage operations" means the ownership, maintenance or use of locations for garage business and that portion of the roads or other access that adjoin these locations. *"Garage operations" also includes the ownership, maintenance or use of the "autos" indicated in SECTION I of this Coverage Form as covered "autos." "Garage operations" also include all operations necessary or incidental to a garage business.* [Emphasis added.]

Appellants contend that the emphasized portion of the "garage operations" definition applied to Spanke's act of driving the covered auto back to Huntington Ford's business, because this constituted a "use" of a covered auto. While this might be a reasonable argument if one looked solely to the definition of "garage operations," we must keep in mind that "the insurance contract should be read and interpreted as a whole." *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW2d 864 (1994). We must construe every word in the agreement to have been included for a purpose, and we must reject no word as mere surplusage if we can discover its reasonable purpose in light of the whole instrument. *Laevin v St Vincent Society*, 323 Mich 607, 610; 36 NW2d 163 (1949). We must give effect to all the language and to every clause in the agreement if such is possible. *Roy Annett, Inc v Killin*, 365 Mich 389, 394; 112 NW2d 497 (1961). In light of provision 1(a)(2)(c), defining an "insured" for purposes of the policy, appellant's argument is without merit. Indeed, if merely *using* a vehicle was sufficient to trigger coverage under the "garage operations" definition, then the exception set forth in provision 1(a)(2)(c) would be rendered meaningless. Accordingly, something besides mere use must be shown in order to trigger coverage here. Specifically, the user must have been working in *Huntington Ford's garage operations*.

Appellants suggest that Spanke was working in Huntington Ford's garage operations because "Spanke's delivery of the vehicle back to Huntington Ford was necessary or, at least, incidental to Huntington Ford's promised service work for the prospective buyer and, therefore, falls within the scope of the coverage of the Chrysler policy." In making this argument, however, appellants cite no admissible facts. A party may not leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Disputed factual issues, or the lack thereof, must be established by admissible evidence to survive summary disposition under MCR 2.116(C)(10). *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Because appellants' argument section of their brief concerning this issue lacks citation to factual support in the record, we decline to address this claim further. We find no basis for disturbing the trial court's ruling.

Even if we *were* to review this issue, we would find no basis for reversal. Indeed, keeping in mind the principles set forth in *Taylor, supra* at 649, *Laevin, supra* at 610, and *Roy Annette, supra* at 394, it is clear that the exception for "[s]omeone using a covered 'auto' while he or she is working in a business of . . . repairing . . . 'autos'" set forth in provision 1(a)(2)(c) above applied to Spanke's act of driving the dump truck. Reading the insurance policy as a whole and giving effect to all its provisions indicates that Spanke fit within the exception because he was servicing the dump truck as part of Four Season's business but not as part of *Huntington Ford's* "garage operations."

Is Spanke Obligated to Indemnify Chrysler?

Appellants argue that even assuming, arguendo, that Spanke was not an insured under the Chrysler policy, Chrysler nonetheless was not entitled to indemnity from him because his active fault in the underlying negligence case was not proven. Appellees contend that Chrysler was indeed entitled to indemnity from Spanke because both his potential liability and the reasonableness of the settlement of the underlying negligence case were shown.[3] Again, we find no basis on which to disturb the trial court's ruling.

Indeed, in appellants' main appellate brief, they cite only one case – *Hoover Corners, Inc v Conklin*, 230 Mich App 567; 584 NW2d 385 (1998) – in support of their claim for reversal on this indemnification issue. *Hoover*, however, involved the construction of a dram shop *statute* that provided for indemnification under certain circumstances and is therefore inapposite to the instant case. See *id.* at 570-571. Accordingly, appellants cite no relevant case law in support of their position. A party may not "'simply . . . announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v*

[3] We note that no party objects to the applicability, in general, of indemnification in this case. The parties simply differ regarding the burden of proof Chrysler bore in order to receive indemnification.

Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we need not address this issue. *Wilson*, *supra* at 243.

Even if we *were* to address this issue, we would find no basis for reversal. Indeed, as noted in *St. Luke's Hosp v Giertz*, 458 Mich 448, 454; 581 NW2d 665 (1998), citing 41 Am Jur 2d, Indemnity, § 46, p 380, if an indemnitor participated in a settlement, the indemnitee, in order to recover on the indemnity claim, need only show the potential liability of the indemnitor. Chrysler, as the subrogee of Huntington Ford and as the indemnitee with respect to Spanke, satisfied this burden.[4]

Should the Judgment for Chrysler Be Reduced by $40,000?

Appellants contend that if we uphold the judgment for Chrysler, the amount of the settlement reimbursement should be reduced to $610,000 because the trial court correctly ruled that the applicable exclusion in the Chrysler policy was contrary to public policy and void and that the minimum legal requirement of $40,000 would apply.[5] See *Citizens Ins Co v Federated Mut Ins Co*, 448 Mich 225, 234; 531 NW2d 138 (1995), and MCL 500.3009(1). Appellees contend that a $40,000 reduction is unnecessary because the judgment was based on common law indemnity from Spanke. We agree with appellants.

As stated above, Spanke was not an insured under the terms of the Chrysler policy. However, it violated public policy for the owner of the dump truck – Huntington Ford – to fail to provide coverage for a permissive user such as Spanke. See MCL 500.3101(1). Accordingly, the trial court reinstated coverage for Spanke to the extent required by law, $40,000, and no party challenges this reinstatement.

Because Huntington Ford's liability in this case was merely passive, see, e.g., *Gulick v Kentucky Fried Chicken Manufacturing Corp*, 73 Mich App 746, 750; 252 NW2d 540 (1977) (liability under the owner's liability statute is based on a passive theory of negligence), Chrysler, as the subrogee of Huntington Ford, was able to recover the amount it paid toward the settlement from the active or potentially active tortfeasor, Spanke, based on common law indemnity. However, the trial court essentially ruled, in making its unchallenged public policy ruling, that Chrysler was *obligated to insure Spanke for $40,000*. Therefore, Chrysler must pay $40,000 of Spanke's indemnity obligation to Huntington Ford, or, viewed differently, $40,000 of the $650,000 that Chrysler initially paid must be deemed paid on behalf of the active tortfeasor, Spanke, and therefore unrecoverable in the indemnity action. The trial court erred in issuing a judgment for $650,000 instead of $610,000 with respect to the settlement reimbursement.[6]

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[4] We emphasize that no active fault on the part of Huntington Ford was alleged. See, e.g., *Gulick v Kentucky Fried Chicken Manufacturing Corp*, 73 Mich App 746, 750; 252 NW2d 540 (1977) (liability under the owner's liability statute is based on a passive theory of negligence).

[5] We emphasize that the trial court's "violation of public policy" ruling is not challenged by any party to this appeal.

[6] We further note that appellees essentially *conceded* below, more than once, that the proper amount of the judgment was $610,000. As just one example, Chrysler's attorney stated during a November 18, 1998 motion hearing that "[t]here's no dispute as to the amount of the 610,000

(continued…)

Was the Judgment for Chrysler a Judgment on a Written Instrument under MCL 600.6013(5), Entitling Chrysler to Twelve Percent Interest Under that Statute?

Appellees/cross-appellants argue that the judgment issued in their favor was issued on an insurance contract and that the applicable interest rate should have been established by MCL 600.6013(5), which states that "if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually . . . ." See *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346-347; 578 NW2d 274 (1998) (holding that the phrase "written instrument" in MCL 600.6013(5) clearly and unambiguously applies to insurance contracts). Appellants/cross-appellees argue that the judgment was based on a common law indemnity claim and that the interest provision from MCL 600.6013(5) therefore did not apply. We agree with appellants/cross-appellees.

The material question is whether the judgment rendered in favor of Chrysler for $650,000 plus $24,360.94 in costs was a judgment on an insurance contract. More specifically, the material question is whether Chrysler received a judgment on the insurance policy that Citizens issued to Four Seasons. We conclude that it did not. Indeed, the settlement contribution made and defense expenses incurred by Chrysler here were on behalf of Huntington Ford; appellees/cross-appellants admit as much in their brief on cross-appeal. After contributing to the settlement and incurring defense expenses on Huntington Ford's behalf, Chrysler stepped into Huntington Ford's shoes, as subrogee, to recover against Spanke *on a common law indemnity claim*.

The fact that Citizens is liable to pay benefits on behalf of Spanke for his liability on Chrysler's common law indemnity claim does not convert the ultimate judgment against Spanke into a judgment rendered in Chrysler's favor on Citizens' insurance policy. Spanke, rather than Chrysler, is the beneficiary of this aspect of the judgment against Citizens. Accordingly, we conclude that Chrysler did not receive a judgment rendered on a written instrument within the meaning of MCL 600.6013(5) but only a monetary judgment on a common law indemnity claim, as subrogee of Huntington Ford.[7] The trial court correctly ruled that the interest rate in MCL 600.6013(5) did not apply.

Affirmed, but the monetary judgment is reduced by $40,000.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

(…continued)

dollars."

[7] We note that it is inconsistent for appellees/cross-appellants to argue, in the context of the $40,000 setoff issue, that the trial court rendered judgment in their favor on a common law indemnity claim but then to later claim, in the context of the interest issue, that the trial court rendered judgment on an insurance contract.